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In The
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE*, JOE OAKLEY, ET AL. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a government employer, faced with evidence of adverse impact or disparate impact but no evidence of illegal discrimination, violate Title VII by rejecting the results of a competitive, content-valid, job-related promotional examination in an attempt to avoid Title VII litigation by unsuccessful participants who belong to protected classes?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae Joe Oakley, Doug Barnes, Jeffrey B. Polk, Michael Rallings, Mary Johnson, Ronald G. Fittes, Kurt Phillips, Anthony Rosser, Terry Landrum, Darrell L. Sheffield, Michael Williams, Michael J. Clark, William Volner, Jerry L. Gwyn, Howell Starnes, Joseph Scott, Gerald Blum, John Callahan Casad, Dale H. Simms, Russell G. Houston, III, Stephen Grisham, Kim C. Mansel, Robert Vaughn, Dennis Benjamin, Randy B. Oliver, Jerry W. Webb, Tracy Gossett, Susan K. Lowe, Gene Pevy, Dawn York, Gregory M. Quinn, James A. Richardson, Mary F. Newsom, Cornell Dye, Timothy E. Cook, Sr., Sandra D. Palmer, Jerry Bouchillon, Richard Borgers, Robert Shemwell and Scott Wilson (the "Oakley Petitioners") are Memphis Police Department officers whose pending petition for certiorari, *Oakley v. City of Memphis*, 08-744, raises issues identical to several of those in the instant case.

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. Ratifying The City of New Haven's Conduct Will Have Pernicious Effects on the Morale of a Variety of First Responder Forces, Including Law Enforcement Officers Such as Amici.

As law enforcement officers, amici curiae are charged with upholding and enforcing the law in their community–Memphis, Tennessee. Amici respectfully suggest that the Second Circuit has, in this case, failed to uphold and enforce the highest law of the land–the United States Constitution. As set forth powerfully in Petitioners' Brief:

> "[T]he Equal Protection Clause does not allow government actors to engage in intentional racial discrimination to avoid potential claims of unintentional racial discrimination. Even if there ever could be such a compelling interest, it could exist only if the government had strong evidence that unintentional discrimination had in fact occurred and not when, as in this case, there was little more than numerical disparity and indeed strong indications that the tests and their results would have survived any Title VII challenge."

(Petrs.' Brief at 28.) In cancelling a content-valid civil service promotions process solely because the test results indicated that not enough minority applicants qualified for promotions, the City of New Haven acted in a manner that the Equal Protection Clause, and this Court, simply cannot countenance. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989)

(Kennedy, J., concurring in part and concurring in judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.").

The fact that the entity whose race-based decision-making has been laid bare before this Court is a local government and, worse still, that the promotional process that it derailed involved one of the most important functions that local government provides–first responder services–amplifies how important it is for this Court to rebuke the actions of the City of New Haven and declare that the desire to avoid being sued for unintentional discrimination does not justify intentional discrimination by government entities.

In addition to offending Equal Protection guarantees, the City of New Haven's cancellation of its promotions process also runs directly contrary to the core goal of Title VII–eliminating racial discrimination from employment decisions. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971) ("[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."). Just as the Equal Protection Clause cannot permit intentional racial discrimination under the guise of avoiding accusations of unintentional racial discrimination, amici agree with Petitioners that "avoiding Title VII disparate impact claims cannot justify intentional race-based disparate treatment." (Petrs.' Brief at 29.)

A pernicious ripple effect from the lower court decisions ratifying the City of New Haven's decision to cancel their promotional process has, in fact, already begun. Amici have their own pending petition for certiorari seeking review of a decision of the Sixth Circuit involving issues strikingly similar to the issues presented by Petitioners. *See Oakley v. City of Memphis,* No 08-744. In *Oakley*, the Sixth Circuit expressly acknowledged that the *Ricci* case was "factually analogous and persuasive authority" given that the results of the promotional tests in *Ricci* also ran afoul of the EEOC's four-fifths guideline. *Oakley v. City of Memphis*, No. 07-6274, 2008 WL 4144820 at * 5 (6th Cir., Sept. 8, 2008). The Sixth Circuit also quoted directly from the district court decision in *Ricci* to support an expressed analysis that effectively appears to be indistinguishable from a soft quota approach to hiring and promotion.

> [I]f promotions were made based on the exam results, the black-to-white selection ratio would fail the EEOC's "4/5ths Rule." No formal analysis is required to determine that, of the 115 test takers, 61 were black, 54 were white, and 24 were women; of the top 28 scorers, 21 were white, 7 were black, and 1 was female. Even if the MPD promoted the top 70 candidates, the race ration would fall 20% below the EEOC's 80% requirement.
>
> Appellants assert that the City should have performed "further analysis" before abandoning the promotional process. Neither Title VII nor agency guidelines require a formal finding of disparate impact. The law does not require an employer to validate or certify a process "where

> they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method."

Id. at *3 (quoting *Ricci v. Destefano*, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 88 (2d Cir. 2008)).

Amici, like Petitioners, are dedicated first responders who devoted significant time and effort, and made personal sacrifices, to prepare for and participate in a promotional process mandated by civil service requirements. Their efforts, like those of Petitioners, were ultimately futile because a municipal government believed it could make an intentional, race-based determination to cancel a content-valid promotions process using the EEOC guidelines as a shield. Condoning this type of conduct will, and does, result in institutional paralysis and mistrust within the ranks of those who would seek civil service promotions because it means that the certainty provided by the competitive process can evaporate for racial reasons. Political expediency and the fear of defensible future lawsuits cannot be a viable legal rationale for making promotional decisions on the basis of race in any governmental context, but most certainly not with respect to first responders. Seeing these scenarios play out with respect to promotional processes that affect the delivery of first responder services–those persons who like Petitioners, amici, and their colleagues throughout the country put their lives on the line every day to protect and serve their communities–only exacerbates the impact of such an untenable situation.

II. The Second Circuit's Ruling Endangers the Viability of the Merit-Based Civil Service System as a Protector of Government Integrity.

This Court has long recognized the widespread use and value of a merit-based civil service system. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990) (Scalia, J., dissenting) ("The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels."); *see also United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 121 (1947). According to this Court,

> [t]he civil service system has been called 'the one great political invention' of nineteenth century democracy. The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people. . . . [T]hose who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the

> complicated machinery of modern government are the core of the civil service.

Mitchell, 330 U.S. at 121 (footnotes omitted).

Affirming the Second Circuit's ruling, however, would jeopardize the vitality of the merit-based civil service system enacted by the City of New Haven[2] and other cities alike. At all levels of government, a diluted merit-based civil service system will breed onerous consequences, including impairment of the government integrity that this Court has repeatedly sought to protect. *See, e.g.*, *Rutan*, 497 U.S. 62; *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1979); *see also Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133 (6th Cir. 1994). The ramifications of the Second Circuit's ruling–destabilization of merit-based civil service promotional systems impacting first responder forces–go beyond the onerous consequences that would be visited on other levels of governmental decision-making. Weakening a merit-based system for the sake of race-based and gender-based employment actions here will engender racial divide among first responders who, in order to be effective in fighting fires and saving lives, must perform as a trusting and cohesive group.

Although the Court's promotion of merit-based principles has largely been in the context of patronage policies, nevertheless, that application is relevant here. After all, it is beyond dispute that the making of

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[2] In order to ensure the smooth functioning of the machinery of its modern government, the Connecticut Supreme Court mandates compliance with civil service laws such as those enacted by the City of New Haven to further promotions on the basis of merit. *Kelly v. City of New Haven*, 881 A.2d 978, 1000 (Conn. 2005).

promotions and other hiring decisions on the basis of race and gender[3] is a more pernicious threat to constitutional principles than acts of political patronage.

III. By Reversing The Second Circuit's Ruling, This Court Can Prevent Onerous and Far Reaching Unintended Consequences That Would Flow From Permitting The Race-Based Decision Made By The City of New Haven.

The record in this matter is clear that the City of New Haven's decision triggering this litigation was based upon race. Each time the government is permitted to use racial criteria in its decision making, the very principles of equality upon which this nation was founded are placed at risk of further erosion. Here, the invalidation of content-valid promotional exams, based solely on the race of some of the applicants, is not only government action that will erode the fundamental principle of equality but will also have far reaching and onerous, unintended consequences on confidence in the civil service system and the morale of minority and non-minority government employees.

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[3] Although the Supreme Court has "consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination," *Local 28 of Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Commission*, 478 U.S. 421, 480 (1986) (plurality opinion), in the instant matter, Respondents admitted they did not act to remedy past intentional discrimination. Pet.App. 938a-945a, 1013a-1037a.

One unintended consequence of ratifying the City of New Haven's actions will be the erosion of confidence in the civil service system. If local governments can treat the EEOC guidelines as essentially a soft quota, it will ensure that race will always be a prominent, and potentially overriding, factor in what are supposed to be merit-based promotional processes. If local governments can disregard the results of content-valid promotional exams based solely on a perception that not enough minority applicants will be promoted, then questions undermining the confidence that a true merit-based civil service system exists at all will always linger.

Yet another unintended consequence of decisions such as the City of New Haven's will be the demoralization of both minority and non-minority government employees. Amici, who are made up of Caucasians and African-Americans alike, are particularly concerned about the demoralizing impact that such race-based governmental decisions will have on the ability of first responders to work together to perform their vital government functions. The City of New Haven's disregard of the results of a promotional process proven to be content-valid will undermine and further stigmatize minority participants in the process as somehow requiring government intervention to secure their promotions. This type of decision-making based on race is a form of harmful discrimination in and of itself. *See Fullilove v. Lutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (noting that "remedial" racial legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race"). And, as for non-minority participants in the process, they

may come to believe that it is useless or unwise to compete for promotions because, despite their hard work in the application process, there exists a risk that even a process proven to be content-valid can simply be scuttled if the results are such that not enough minority participants will be promoted.

This Court has recognized that government employees need to rely on civil service merit processes to protect them from the vagaries of arbitrary political machinations. Government employees, and especially first responders, also need protection from improper considerations of race and gender. Civil service merit processes can provide that protection, but only if they are enforced and not so easily scuttled based simply on less than desirable results.

This Court certainly does not need amici to explain that a survey of reported federal cases nationwide paint a vivid picture of the corrosive effects that the use of race and gender considerations have when injected into what are intended to be neutral, content-valid civil service processes. The particular corrosive effect when the government pays scrupulous attention to the race and gender of employees making up first responder forces is visible not just from a survey of federal jurisprudence, but has even worked its way to some prevalence in popular culture. *See, e.g.*, Joseph Wambaugh, Hollywood Crows: A Novel (1st ed. 2008). The breakdown of police and fire departments into racial groups has not only furthered the very problems that Congress passed laws such as Title VII to prevent and repair, but also has engendered distrust and suspicion among first responder forces in ways that serve to erode the morale of those vital governmental employees.

Police and firefighters depend on their colleagues on society's front line and place their lives in each others hands every day. State and local governments, with the encouragement and under the protection of this Court, have instituted civil service procedures to insure that competence is rewarded and that promotions are based on merit, not politics. In a world in which the brave men and women who serve as firefighters in the City of New Haven, and other first responders, are so desperately needed by society, this Court must not condone governmental decisions that leave such first responders wondering whether they and their fellow officers have their positions because of merit or because of race.

CONCLUSION

The judgment of the Second Circuit on this important question endangers the delivery of emergency services throughout the nation and for that reason alone the Court should reverse the judgment below.

Respectfully submitted,

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